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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOSEPHINE PECORARO, as Trustee, etc. et al., Plaintiffs, Cross-defendants, and Appellants, v. LOUIS BARBACCIA, SR., Defendant, Cross-complainant, Cross-defendant, and Respondent, GBR MAGIC SANDS MHP LLC et al., Defendants, Cross-complainants, Cross-defendants, and Appellants.	H040008 (Santa Clara County Super. Ct. No. CV186621)
JOSEPHINE PECORARO, as Trustee, etc. et al., Plaintiffs, Cross-defendants, and Respondents, v. GBR MAGIC SANDS MHP LLC et al., Defendants, Cross-complainants, and Appellants.	H040222 (Santa Clara County Super. Ct. No. CV186621)

Defendants Cyril Barbaccia and GBR Magic Sands MHP LLC (GBR) (collectively, defendants) appeal from a judgment entered after the trial court cancelled a 98-year ground lease that Cyril and his brother Louis P. Barbaccia, Sr.[1] entered into with their now-deceased parents in 1963 (the 1963 lease) and from the trial court's orders denying their motions to vacate the judgment and enter a new and different judgment. The 1963 lease encumbered the parents' undivided 50 percent interest in a 20-acre parcel of land that the brothers developed into the Magic Sands Mobile Home Park in San Jose (Magic Sands).

On appeal, defendants contend that (1) plaintiffs' action was barred by the statute of limitations; (2) plaintiffs' action was barred by res judicata; (3) plaintiffs waived their right to cancel the 1963 lease and quiet title by signing a "Ground Lessor Estoppel and Agreement" (the Estoppel Agreement); (4) the trial court improperly awarded equitable relief without proof that damages were an inadequate remedy; (5) the court erred in cancelling the 1963 lease "as to Lou" because he was not equitably entitled to cancellation; and (6) the court erred in cancelling the 1963 lease as to GBR because GBR was a bona fide purchaser. GBR additionally challenges the trial court's order awarding plaintiffs their attorney's fees. We affirm.[2]

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[1] The parties share surnames so we use their given names to avoid confusion. We refer to Cyril as Cy and to Louis as Lou. Cy's wife Lena was dismissed as a defendant before trial but she remains a respondent on appeal. Since she and Cy make the same arguments on appeal, we refer to them collectively as Cy. GBR joins in Cy's arguments. Cy joins in GRB's statute of limitations argument and in its other arguments to the extent they pertain to him. Plaintiffs and Lou join in each other's arguments.

[2] Because we affirm the judgment, we need not reach plaintiffs' "protective" cross-appeal, which asked us "in the event of a reversal or modification" to reverse or remand the earlier voluntary dismissal with prejudice of their remaining causes of action. We will dismiss plaintiffs' cross-appeal as moot.

I. Factual and Procedural Background

Philip and Josephine Greco Barbaccia had four children: Josephine in 1923, Rita in 1925, Cy in 1927, and Lou in 1929. The family had a cherry ranch on Dry Creek Road in San Jose. In 1945, Philip gave his sons a choice: "Either go to college or my father would loan us [$]30,000 to $35,000 to buy a piece of property as a start in the farming business. We chose farming." In 1945, Philip purchased a 56-acre orchard on Cottle Road. Cy was in the military then so Lou worked the Cottle Road ranch after school and on weekends. Cy came home in 1948 and began working both ranches. The Cottle Road ranch did not generate enough income to support both brothers' families, so Cy worked the ranch while Lou went to work as a contractor. Lou obtained his contractor's license in 1955. In the 1950's, "the lion's share of farming work was done by [Cy rather than by Lou]."

The area around the parents' Dry Creek Road orchard was being developed in the 1950's. Lou suggested subdividing and developing the cherry orchard street by street so that "as I built it out my father could keep farming the rest of it . . . ." "We kind of put a family partnership together . . . ." "From 1957 to 1963, about 70 lots . . . were subdivided and a number of higher-end homes built on the lots."

In 1960, the brothers convinced their father that they "could pull . . . off" the development of a mobile home park. In December 1960, the parents purchased a 20-acre orchard on Blossom Hill Road. Title was immediately vested in them and their sons, with the parents taking an undivided 50 percent interest and Cy and Lou each taking an undivided 25 percent interest in the property. Over the next few years, the brothers bought about 36 additional acres surrounding the original 20 acres.

In 1963, "the permits came in to actually break ground" on the project that would become Magic Sands. In a sequence of related transactions on July 16, 1963, (1) Philip deeded the parents' undivided 50 percent interest in the Blossom Hill Road property to Cy and Lou; (2) the brothers obtained a $642,700 loan that they secured by a deed of trust

on the property; (3) Cy and Lou deeded back to the parents an undivided 50 percent interest in the property, which was now encumbered by the deed of trust; and (4) the parents leased their undivided 50 percent interest in the property to the brothers for 98 years.

The l963 lease provided that rent payments to the parents would not begin until October 1966. The rent was $10,000 per year, with annual increases based on the wholesale price index. The lease had no revaluation provisions. It allowed assignment by the lessees without landlord approval. It required the parents to pay "any interest on any mortgage or mortgages which may be a lien against the fee simple" and left them liable for loan payments if any payment was missed. The parents were not represented by independent counsel when the 1963 lease was negotiated.

Seventeen days after the 1963 lease was signed, the brothers entered into a 90-year ground lease with Ingeborg Johnson, who owned 10 acres adjacent to the original 20 acres. The Johnson lease prohibited subletting and assignment without landlord consent and included rent revaluation and other terms materially more beneficial to the landlord than the terms of the 1963 lease. The brothers later purchased the Johnson property pursuant to an option provision in the lease.

In 1967, the brothers incorporated Magic Sands Mobile Home Community (Community) to serve as the management entity for Magic Sands. On the same day, they subleased their parents' 50 percent undivided interest in the original 20 acres to Community. They also leased their own 50 percent undivided interest in the original 20 acres to Community. This lease and the sublease included more landlord-friendly terms than the 1963 lease. The original 20 acres were fully developed by 1968 and the brothers began to develop the Johnson parcel. Magic Sands ultimately grew to encompass its present 56 acres.

Cy "did everything" with respect to Magic Sands. He had his office there, and his responsibility "was to handle everything." Lou had in 1964 begun developing the Cottle

Road property into a golf course and spent his time on that project. His office was at the golf course. He "didn't have anything to do with the operation of Magic Sands."

In March 1970, Philip created the Philip C. Barbaccia Trust and transferred all of the parents' assets, including their undivided 50 percent interest in the original 20 acres and their interest as landlords under the 1963 lease, to the trust. The parents were lifetime income beneficiaries under the trust and their four children were residual beneficiaries. Cy and Lou were cotrustees.

Philip died in 1976. His wife died on February 13, 1990. Rita had died in 1989, survived by her children Anthony and Catherine Pecoraro. In 1993, fractional interests in the trust property were distributed to Josephine, Anthony, Catherine, Cy, and Lou. Anthony sold his interest to Cy in 1998. At that point, ownership of the original 20 acres was as follows. Cy owned an undivided 3/16 interest that was subject to the 1963 lease. Josephine and Lou each owned undivided 2/16 interests and Catherine owned an undivided 1/16 interest, all of which were subject to the 1963 lease. Cy and Lou each continued to own additional undivided 4/16 interests that were not subject to the 1963 lease.

In 2005, the brothers became embroiled in litigation over the dissolution and winding up of their partnership, which was "the de facto holding company of the Barbaccia family businesses." (Italics omitted.) In 2006, the bulk of the partnership's property (including Magic Sands, a second mobile home park, and an apartment complex) was sold at auction. Cy refused to include the fractional interests subject to the 1963 lease in the auction. He and new business partners formed GBR, and GBR purchased Magic Sands without the fractional interests for approximately $50 million.

In February 2007, plaintiffs and Lou sued to partition the original 20 acres, including the fractional interests. They dismissed the lawsuit without prejudice in March 2007 to facilitate the closing of a $38.5 million loan to finance GBR's purchase of Magic Sands without the fractional interests in the partnership dissolution proceeding. In

connection with the sale, Cy, Lou, Josephine, and Catherine as landlords and GBR's predecessors in interest as tenants signed the Estoppel Agreement, which recited among other things that the 1963 lease "is in full force and effect in accordance with its terms . . . ."

Plaintiffs and Lou refiled their partition action in April 2007, after the sale of the former partnership's interest in Magic Sands was completed. Plaintiffs took Cy's deposition in that action on January 8, 2008. Two weeks later, they dismissed their partition complaint without prejudice.

Plaintiffs and Lou filed a new partition complaint on March 17, 2008.[3] In addition to a cause of action for partition, the complaint asserted causes of action against Cy and his affiliated entities (Barbaccia Magic Sands LLC and GBR Magic Sands LLC) for cancellation of the 1963 lease and a declaration that it was void. On September 8, 2008, plaintiffs filed a first amended complaint that omitted the second and third causes of action but continued to name the then-current lessees under the 1963 lease as defendants. In April 2009, those defendants moved for judgment on the pleadings on the ground that they were no longer proper parties as the complaint did not allege that they had any interest in the property that would be materially affected by partition. The trial court granted the unopposed motion.

In August 2009, Plaintiffs and Lou sought leave to file a second amended complaint against Barbaccia Properties Holdings LLC, GBR San Jose MHP LLC, and Cy, all of whom had fee interests in the property. The proposed second amended complaint included the previously-dropped causes of action for cancellation of the lease and declaratory relief but did not name the then-lessees as defendants. Cy and the ownership entities opposed the motion to amend on grounds (among others) that the

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[3] Plaintiffs and Lou ask that we take judicial notice of certified copies of pleadings and court documents filed in connection with the partition actions. We grant the unopposed request. (Evid. Code, § 452, subd. (d).)

complaint failed to join indispensible parties and that allowing amendment "to re-introduce issues of the validity of the [l]ease" would prejudice them as they had done no discovery on those issues and would be forced into a hurried preparation for trial. The court denied the motion without prejudice.

In November 2009, MHP Roll-Up LLC (the successor in interest to Barbaccia Properties Holdings LLC and GBR San Jose MHP LLC) answered plaintiffs' first amended complaint for partition. In its answer, MHP Roll-Up expressly prayed "[t]hat partition by sale of the property be had . . . subject to the existing encumbrances of record on the Property, including but not limited to: [¶] a. [the 1963 lease]."

The partition sale occurred on November 4, 2010. Plaintiffs and Lou were the successful bidders. They purchased the original 20-acre parcel for approximately $5 million. After the sale, ownership of the original 20 acres was as follows. Josephine owned an undivided 2/16 interest subject to the 1963 lease. Catherine owned an undivided 1/16 interest subject to the 1963 lease, Lou and/or his company LouBar LLC owned an undivided 5/16 interest subject to the 1963 lease, and LouBar LLC owned an undivided 8/16 interest that was not subject to the 1963 lease.

Plaintiffs filed the instant action on November 4, 2010. The operative pleadings are plaintiffs' second amended complaint against defendants and Lou; Lou's third amended cross-complaint against Cy; and defendants' cross-complaint against plaintiffs and Lou.

Plaintiffs' second amended complaint asserted causes of action for cancellation of the 1963 lease and damages (Civ. Code, § 3412),[4] rescission, quiet title, breach of fiduciary duty against Cy, financial elder abuse of plaintiff Josephine against Cy, and fraudulent concealment against Cy. The gravamen of the complaint was that Cy had a confidential and fiduciary relationship with the parents in 1963 and used it to gain an

[4] Subsequent statutory references are to the Civil Code unless otherwise specified.

unfair advantage by inducing them to enter into a 98-year lease with terms that he knew were "unfair, substantially below fair market value and otherwise not customary or usual for leases of this type . . . ."

Lou's third amended cross-complaint asserted a single cause of action for cancellation of the 1963 lease. The gravamen of the cross-complaint was that Cy as the oldest son "in his words 'masterminded' the [1963 lease] transaction," thus exploiting the confidential and fiduciary relationship he enjoyed with his parents at the time. Lou's cross-complaint was ultimately dismissed as moot.

Defendants' cross-complaint against plaintiffs and Lou asserted causes of action for deceit, declaratory relief, and indemnity by Cy against Lou. The gravamen of that cross-complaint was that plaintiffs' and Lou's false representations in the Estoppel Agreement induced defendants' predecessors in interest to consummate a $38.5 million loan secured in part by the 1963 lease. The cross-complaint sought a declaration that cancellation of the 1963 lease would violate the Estoppel Agreement and "that the 1963 Lease is in full force and enforceable."

The trial court conducted a phased bench trial. The first phase addressed the legal effect of the Estoppel Agreement. The court concluded that the agreement did not bar plaintiffs' causes of action for cancellation of the lease and quiet title.

The second phase addressed plaintiffs' equitable causes of action for cancellation, rescission, and quiet title.[5] Cy testified that he and Lou began building homes on the Dry Creek Road property in the 1950's. He and Lou were equal partners in the venture. Cy did not recall whether his parents were also partners in the venture or if there were discussions about how profits would be shared, "but there must have been."

Cy testified that his father asked him to invest the parents' money in a piece of property. He recalled buying 20 acres on Blossom Hill Road to develop into a mobile

[5] As plaintiffs' later election of remedies rendered their rescission cause of action moot, we do not discuss it further.

home park but did not recall using his parents' money to buy it. He recalled that his parents had an interest in the property. When he could not recall how they gained that interest, testimony from his January 2008 deposition was read into the record. At the deposition, he testified that "[t]hey had an interest in the first piece of property . . . ." "They purchased it because of me. I'm the one that got them to purchase it." "That was the onset of the first development." "My father wanted me to invest his money for him so that's what I did." "I used his money to purchase it."

Cy testified that his parents leased the Blossom Hill property, but he did not recall the negotiations that led up to the lease. When he was asked if he was in the habit of giving his parents business advice, he responded, "I was his son. Who else would you want to take advice from?" He testified that he "regularly" consulted with his parents about their business dealings and offered them advice "on how to invest their money and things like that . . . ." He testified that his parents relied on his advice. Cy considered himself "to be a very sophisticated businessman." When he was asked if he was a sophisticated businessman in 1963, he responded, "I think I was."

Cy did not recall advising his parents about the 1963 lease. He testified that he must have read it completely if he signed it because he typically does so. He did not recall who suggested the 98-year term. He testified that he did not suggest the formula that adjusted rent payments only for inflation. When he could not recall whether his parents suggested the formula, excerpts from his deposition testimony in response to a similar question were read into the record. "I don't think my parents -- they weren't very hep as far as formulas." He admitted that his parents were not aware of lease formulas in 1963. He did not recall giving them a copy of the 1963 lease.

Cy recalled leasing acreage from Johnson but did not recall the lease terms or conditions. He did not recall disclosing the Johnson lease to his parents. He recalled reading an appraisal he commissioned in 1965, which showed that the original 20-acre property was generating $111,727 in net annual income even before rent payments to his

parents began. He agreed that the $111,727 figure was accurate. He did not recall giving his parents a copy of the appraisal or discussing it with his siblings.

Cy did not recall distributing his parents' trust property to the beneficiaries in 1992. He stated that "[i]f the record shows it, then I did. If the record do[es]n't show it, then I didn't." "I am the one that orchestrated whatever my signature is on. . . . If it's part of the record, I stand by it. If it's iffy, then I don't recall." He did not recall whether he told his siblings or Catherine about the negotiations that led up to the 1963 lease.

Lou testified that he built some of the structures at Magic Sands but played no role in the project's financing. "That was Cy's project." Lou remembered signing documents but had "[n]o idea" about the details. When asked if he read them before signing them, he explained that "[i]t was like, you know, on my construction side when I needed something signed by my brother, . . . he signed it and so forth. I'm in charge . . . and he never questioned me. And the same thing. Whatever he had there, it was his deal, and I didn't stick my nose in it. Signed it and I'm out of there." Lou had no role in managing Magic Sands. He had no idea that he signed a 98-year ground lease. He never heard either of his parents mention a ground lease or a 98-year lease. He signed the trust instrument "[b]ecause my brother asked me to sign it." He did not read it. "That was Cy's department, and he handled it." "Cy ran everything to do with the books." Lou never had any discussions with Cy about the 1963 lease because "any time" he asked Cy about "anything involving money or finances," Cy "would tell me that I was 'interfering.'"

Lou testified that he became aware of the 1963 lease only after his mother died. When he received his initial rent check in 1993, he called the company accountant and discovered that his fractional interest was subject to a lease, "which was [a] complete surprise." He had no reason then to suspect that his parents did not know what they were doing when they signed it, nor did he question the 98-year term or the amount of rent. "I

figured . . . that was her wishes and my father's wishes." "I never would have questioned my folks."

Lou attended Cy's January 2008 deposition in the partition action. That was the first time he suspected any wrongdoing on Cy's part in connection with the 1963 lease. "Well, actually, it was hard to believe when he made the comments that he masterminded[[6]] the whole thing. He did the whole thing. I couldn't believe it." "It's still unbelievable." "I didn't think that what he did was to my parents' best interest." "I was just dumbfounded." Lou told his sister and Catherine what he learned at Cy's deposition. On November 4, 2010, they filed suit to protect the family interest in the property and to obtain "the proper amount of income that was originally left to us."

Catherine was three years old when the 1963 lease was signed. She testified that she never talked to Cy or Lou about business dealings at Magic Sands while she was growing up. No one told her the property she inherited from her grandmother was subject to a lease. She thought the payments she began receiving in 1992 or 1993 came from a trust. Her tax preparer wanted specifics so Catherine called Cy, who said the

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[6] Cy's "mastermind" testimony came in response to deposition questions about who suggested the 98-year lease term. When asked if his parents suggested it, he replied, "I couldn't tell you." Asked if he had no recollection, he replied, "No. What can I tell you? Tell you I was a mastermind? I masterminded it? I don't remember." The questioning continued as follows. Q: "I'm sorry. You were the mastermind?" [¶] A: "I say you want me to say that?" [¶] Q: "If it's true, sure. If it's not true, I don't want you to say it. This is a search for the truth, Mr. Barbaccia." [¶] A: "Let the record stay like it is." [¶] Q: "Mr. Barbaccia, did you mastermind the Magic Sands property deal?" [¶] A: "The answer is no." [¶] Q: "You were not a mastermind in that transaction?" [¶] A: "I'm not a mastermind. What makes you think I'm a mastermind?" [¶] Q: "Were you the one who essentially developed that property?" [¶] A: "That makes me a mastermind?" [¶] Q: "I'm not arguing with you, sir. I'm just asking you a question." [¶] A: "I can tell you what that makes me but I'm not able to discuss it. I don't remember." The trial court found that Cy's responses were "not a direct admission that he 'masterminded' the 1963 Lease" but that the "totality of [his] deposition and trial testimony" supported a conclusion that he was the "essential architect of the transaction."

payments were " 'income from ownership.' " She was "pretty shocked" when Lou told her what he learned at Cy's 2008 deposition.

Norman Hulberg testified for plaintiffs as an expert in real estate appraisals. He gathered archival information "[t]o form an opinion on whether this was a market lease, whether these were typical terms." "In other words, a lease that had terms that were . . . seen as generally fair between landlord and tenant." Hulberg opined that the 1963 lease "wasn't remotely a market lease." His "area of biggest concern" was the lack of revaluation provisions. "[T]hese longer term leases in this region normally have an adjustment based on revaluation at some point." "[T]he longer the lease, the more important that is" because "typically property values have increased much faster than [the] wholesale price index." Without such a provision, the 1963 lease "d[id] not take into account actual appreciation of real estate values as opposed to buying power." The requirement that the landlord pay the interest on mortgages also "play[ed] a big role" in Hulberg's opinion "because there's a sequence of deeds that were recorded against this property that have a dramatic impact on the financial risk that the parents were under in this lease." Hulberg was also troubled that the 1963 lease had "no prohibition on assignment at all." That was "certainly very unusual" and gave "no protection at all to the property owners or the landlord."

Hulberg testified that the Johnson lease was "very much typical" of a market lease. Among other things, it had a stepped or tiered rent schedule, contained revaluation provisions, included restrictions on assignment and subletting, and apportioned any condemnation award between lessor and lessee. The 1963 lease contained none of those protections. The brothers' 1967 sublease of their parent's ground lease to Community bolstered Hulberg's opinion that the 1963 lease was not a market lease. The sublease had a 20-year term. It subleased "the very same property" for an annual rent that was $11,000 more than the rent under the 1963 lease. It required revaluation every five years. The brothers' lease of their own undivided 50 percent interest in the property to

Community had "identical or close to identical" terms. Both leases were materially more landlord-friendly than the 1963 lease.

Chris Carneghi testified for defendants as a supplemental expert in appraisals and long-term leases. He opined that the 1963 lease was "landlord friendly." On cross-examination, he conceded that he had no leases to show the court to support his opinions. He had no notes. Carneghi relied on memory but could not remember details. He did not read Hulberg's deposition testimony. He was unfamiliar with the deeding and financing sequence on the Blossom Hill Road property and did not know about the $642,000 loan. He agreed with Hulberg that subordinating a ground lease to financing poses a risk to a ground lessor and "can be one of the riskiest things you can do in a ground lease."

Lawyer John Willoughby testified for defendants as a non-retained expert in estate planning and estate tax. He had represented Cy and his various entities since at least the 1980's. He prepared Josephine Greco Barbaccia's estate tax return. Willoughby opined that a 98-year lease "could be an effective and was used at times as an effective tool for transferring use of property immediately to a younger generation without incurring a current gift tax on that transaction . . . ." He could not testify about Philip or Josephine Greco Barbaccia's estate planning intent however, as he had never met or done any work for either of them.

Plaintiffs called lawyer and certified taxation specialist Clarence Ferrari as a rebuttal expert on estate planning practices from the early 1960's to the present. Ferrari testified that in his recollection, long-term leases "were not used at all" as estate planning devices in the early 1960's.

The trial court issued a 35-page statement of decision. The court found that plaintiffs established by a preponderance of the evidence that Cy had a confidential and fiduciary relationship with his parents when the 1963 lease was negotiated and executed and that he gained an unfair advantage from the lease. Those findings created a presumption of undue influence, which defendants failed to rebut at trial. The court

"additionally" determined that the 1963 lease was "void and therefore subject to cancellation pursuant to . . . section 3412." The court also determined that defendants failed to prove any of their affirmative defenses.

The court entered judgment cancelling the lease and quieting title to the property in plaintiffs and Lou. Plaintiffs' election of remedies rendered their rescission cause of action moot and they had agreed not to pursue their remaining causes of action, so the court dismissed those causes of action with prejudice. The court dismissed Lou's cross-complaint for cancellation as moot. It entered judgment for plaintiffs on the first two causes of action in Cy's cross-complaint for deceit and declaratory relief and severed the third cause of action for indemnity. Cy later dismissed that cause of action without prejudice.

Defendants moved to vacate the judgment and enter a new and different judgment. The court denied their motions. The court ordered GBR to pay plaintiffs' attorney's fees. Upon GBR's payment of a $544,381 undertaking, the court stayed enforcement of the judgment pending appeal. Defendants timely noticed appeals from the judgment. This court ordered the two appeals considered together for purposes of briefing, oral argument, and decision.

II. Discussion

A. Statute of Limitations

Defendants contend that the trial court erred in rejecting GBR's statute of limitations defense to plaintiffs' action. They argue that the court misallocated the burden of proof and that plaintiffs could not have prevailed "under the proper burden." Plaintiffs and Lou respond that defendants forfeited the burden of proof argument by failing to raise it below. They argue that the argument is in any event immaterial because the court provided two independent bases for its decision and the first was supported by substantial evidence. We agree with plaintiffs and Lou.

There is no dispute that the three-year limitations period prescribed by Code of Civil Procedure section 338, subdivision (d) applies. That subdivision provides that a cause of action based on fraud or mistake "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (*Ibid.*) "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 (*Jolly*).) "[I]t is the discovery of facts, not their legal significance, that starts the statute." (*Id.* at p. 1113.) "[A] *suspicion* of wrongdoing, coupled with a knowledge of the harm and its cause, will commence the limitations period." (*Jolly*, at p. 1112.) "[I]f an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint." (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 437 (*Hobart*).) "[P]laintiff is not barred because the means of discovery were available at an earlier date *provided* he has shown that he was not put on inquiry by any circumstances known to him at any time prior to the commencement of the three-year period . . . ." (*Id.* at p. 439.) "[R]esolution of the statute of limitations issue is normally a question of fact." (*Jolly*, at p. 1112.) "[W]hen the facts are susceptible to opposing inferences, whether 'a party has notice of "circumstances sufficient to put a prudent man upon inquiry as to a particular fact" and whether "by prosecuting such inquiry, he might have learned such fact" [citation], are themselves questions of fact to be determined by the jury or the trial court.'" (*Hobart*, at p. 440.)

1. Standard of Review

"When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) "[M]isallocation of the

burden of proof is not 'reversible error *per se*' [and] does not vitiate the substantial evidence rule." (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 736.) "[A]n error in allocating the burden of proof must be prejudicial in order to constitute reversible error." (*Id.* at p. 738.)

Cy asserts that we should apply the de novo standard because the relevant facts were undisputed. We cannot agree with this characterization. When plaintiffs discovered or should have discovered facts sufficient to put them on notice of Cy's wrongdoing was vigorously disputed. Plaintiffs and Lou maintained that they were unaware of any wrongdoing and had no reason to suspect anything untoward before Cy's January 2008 deposition because he "never disclosed the true facts and circumstances surrounding the 1963 lease to his parents or to his brother and sisters" before he was required to do so under oath. Defendants argued that plaintiffs and Lou knew in 1992 that the rent was "low," that the low rent would have made a reasonably prudent person suspicious, and that plaintiffs therefore had a duty to investigate further. Catherine testified, however, that she "was happy to get the money" and never questioned or complained about the amount. Defendants argued further that plaintiffs knew in March 2007 that the 1963 lease had a 98-year term and "certainly knew or should [have] known that there was an issue about this lease when they signed that estoppel agreement" in March 2007. Given the parties' divergent views of the facts, the substantial evidence standard applies.[7]

2. Forfeiture

"[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S.B.*).) The rule applies to litigants who fail to alert the trial court to alleged deficiencies in a statement of decision. (*In re Marriage of Arceneaux* (1990) 51

[7] Lou argues that GBR waived all issues on appeal by failing to address the standard of review. The cases that he cites do not support that proposition, and we have found none that do.

Cal.3d 1130, 1132-1134 (*Arceneaux*); Code Civ. Proc., § 634.) The rationale is that "it would be unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial." (*Arceneaux*, at p. 1138.) Appellate courts have discretion to excuse forfeitures but such discretion should be exercised "rarely and only in cases presenting an important legal issue." (*S.B.*, at p. 1293.)

Here, defendants raised no objection to the trial court's alleged misallocation of the burden of proof on the statute of limitations issue. They had ample opportunity to do so. The court issued its tentative decision on December 19, 2012. In early January 2013, defendants requested a statement of decision explaining "the factual and legal bases" for the court's decision. They specifically asked for a finding on whether plaintiffs' claims were time-barred. Over the next four months, all parties submitted proposed statements of decision, extensive objections and responses and replies to each others' proposed statements, and additional objections and responses to plaintiffs' revised and further revised proposed statements. Importantly, plaintiffs' proposed, revised, and further revised proposed statements all included the very findings and conclusions that defendants now challenge, yet neither Cy nor GBR raised the burden of proof issue in any of their papers. The court held two hearings on the proposed statements. At the first, it expressly invited the parties to "either highlight what you think is critically important for the Court in issuing a final statement of decision and/or make some additional comments to things in the papers that you haven't had a chance to deal with." Even then, neither Cy nor GBR argued or even suggested that the trial court had misallocated the burden of proof on the statute of limitations issue. Nor did they raise the issue in their posttrial motions to vacate the judgment. They have forfeited the issue on appeal. (*S.B.*, *supra*, 32 Cal.4th at p. 1293; *Arceneaux*, *supra*, 51 Cal.3d at pp. 1132-1134.)

We would reject Cy's and GBR's argument even if they had preserved it. This was not a close case in which the outcome on the statute of limitations issue turned on which party had the burden of proof. The statement of decision provided two independent bases for the court's conclusion that plaintiffs' action was timely filed. The first was the absence of any "credible evidence suggesting that Plaintiffs became aware of facts that would have put a reasonable person on notice that something was untoward regarding the negotiation and execution of the [1963 lease] before 2008." The second and alternative basis was that Cy's status as a fiduciary who concealed material facts from plaintiffs and also failed to render an accounting shifted the burden to him and GBR to prove that plaintiffs were aware before January 2008 of facts that would have put a reasonable person on notice of the alleged wrongdoing.

Defendants dispute this interpretation of the statement of decision. They maintain that "[t]he express basis for the superior court's ruling on the statute of limitations issue was that 'Cy and GBR failed to carry [their] burden.'" Not so. Defendants' failure to carry their burden was the basis for the court's *alternative* ruling. Defendants incorrectly conflate the two rulings.

Our interpretation is supported by the fact that the court did not refer to the burden of proof in cases involving fiduciaries or mention Cy's role as a fiduciary until the final page of its three-page analysis. That mention came after the court had discussed the evidence and made the findings supporting its conclusion that there was no credible evidence that plaintiffs were aware of facts that should have put them on notice of wrongdoing before 2008. Only then did the court go on to make additional findings that Cy was a fiduciary, that he failed to disclose the circumstances surrounding the negotiation and execution of the 1963 lease, and that he also failed to provide an accounting to plaintiffs, who were among the beneficiaries of the Philip C. Barbaccia Trust. The court cited cases holding that a reversed burden of proof applies when a fiduciary has concealed the material facts giving rise to a cause of action (*Strasberg v.*

Odyssey Group, Inc. (1996) 51 Cal.App.4th 906, 916-917, citing *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561-563 (*Bennett*)), and that doubts are resolved against a fiduciary who fails to provide an accounting. Relying on those cases, the court concluded that defendants (as "the entit[ies] that Cy testified he owns") failed to carry their burden. On that alternative basis, the court "*confirm*[*ed*]" that the date of discovery for purposes of accrual of their causes of action was January 8, 2008. (Italics added.) We agree with plaintiffs and Lou that the reversed burden of proof that applies in cases involving a fiduciary relationship provided an alternative basis for the court's ruling.

GBR challenges the trial court's alternative ruling. It argues that the burden-shifting rule in cases involving fiduciaries does not extend to statute of limitations analyses and even if it does, it was improper to apply that rule here. We need not decide whether the alternative basis for the court's statute of limitations ruling was correct because we conclude that the first basis was supported by substantial evidence.

Under the substantial evidence standard, "the power of the appellate courts begins and ends with a determination . . . whether there is any substantial evidence to support [the trial court's findings]. The reviewing court has no power to . . . to weigh the evidence, to consider the credibility of witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom . . . . All conflicts in the evidence must be resolved in favor of the respondents and all legitimate and reasonable inferences must be indulged in to support the judgment." (*Phillips v. Standard Acc. Ins. Co.* (1960) 180 Cal.App.2d 474, 480.)

Here, the trial court found "that Plaintiffs were not aware of facts that triggered a duty to investigate until Cy's deposition on January 8, 2008." The court found that there was "no credible evidence . . . that Plaintiffs became aware of facts that would have put a reasonable person on notice that something was untoward regarding the negotiation and execution of the [1963 lease] before 2008. To the contrary, the Court finds that no investigation by Plaintiffs would have revealed Cy's actions because . . . such facts were

known only to Cy until January 8, 2008." Cy was "the essential architect of the transaction."

The court rejected defendants' primary arguments that the "'low'" rents that plaintiffs began receiving in 1993 put them on notice and that their awareness of the lease terms when they signed the Estoppel Agreement in 2007 "unquestionably" put them on notice. The relevant inquiry in the court's judgment "turn[ed] on whether or not Plaintiffs knew of the circumstances surrounding the execution and negotiation of the 1963 Lease, including Cy's undue influence on the Parents, at a time earlier than would be permissible under the statute of limitations." The court found that they did not.

Substantial evidence supported the court's findings. Cy testified that he did not recall any discussions with Josephine or Catherine about the negotiation and execution of the lease. Catherine testified that she never discussed the business of Magic Sands with Cy or Lou while she was growing up. She never heard anyone in the family talk about a ground lease, a 98-year lease, or the subject of leasing at all until after her grandmother died. When she started receiving payments in 1992 or 1993 and asked Cy about them, he said only that the payments were "'income from ownership.'" She had "[n]o idea at all" that there was a lease on the property. She was "pretty shocked" when she learned in 2008 about the circumstances surrounding the negotiation and execution of the lease. She "couldn't believe that he would do something like that, you know, my uncle. It was hurtful that he had been, you know -- I hate to use this word, but cheating the family . . . ."

Lou testified that he and Josephine "from time to time" discussed their disappointment with the "low" rent they were receiving. He said that they "accepted it" however, because "it was my folks' wishes . . . . I mean, if that's what they wanted to do, we accepted it, but we didn't think it was fair."

Lou testified that he played no role in the financing of Magic Sands, had "[n]o idea" about the details, and was not involved in managing the mobile home park. He did

not talk to Cy in 1963 about a lease on the property. He knew "very intimately the life of [his] father" and was "[v]ery close" to his mother and sisters. His parents "never mentioned" that the land was subject to a 98-year lease. Lou first learned that the fractional interest he inherited from his mother was subject to a lease when he received his initial rent check in 1993. He obtained that information from the accountant for Magic Sands. Lou did not ask Cy about the 1963 lease because they were not on good terms in those days and Cy was "[a]bsolutely impossible" to deal with. News of the lease came as "[a] complete surprise" to Lou, but he had no reason at the time to suspect that Cy exercised undue influence over their parents. Lou never questioned the 98-year lease term or the amount of rent because he "figured . . . that was her wishes and my father's wishes." "We all thought it was our parents that was writing the script . . . ." Lou did not suspect any wrongdoing in connection with the 1963 lease until he attended Cy's deposition in 2008. He was "just dumbfounded" when he heard Cy's testimony.

The trial court could reasonably have concluded from all of this testimony and particularly from Catherine's "shocked" and Lou's "dumbfounded" reactions that neither was aware before Cy's 2008 deposition of any facts that suggested wrongdoing on Cy's part and therefore triggered an obligation to investigate further. The court could also reasonably have inferred from Lou's "[v]ery close" relationship with his mother and his sisters that Josephine was similarly unaware of any wrongdoing on Cy's part. The inference is bolstered by the fact that Lou telephoned Catherine and went to see Josephine immediately after the deposition to tell them what he had learned. We conclude that substantial evidence supported the trial court's finding that plaintiffs were not aware before January 2008 of any facts that triggered or should have triggered a duty to investigate Cy's involvement in the negotiation and execution of the 1963 lease. Their November 4, 2010 complaint was thus filed well within the three-year statute of limitations. The trial court did not err when it rejected defendants' statute of limitations defense.

B. Res Judicata

Defendants argue for the first time on appeal that plaintiffs' action was barred by the doctrine of res judicata because plaintiffs asserted "and then inexplicably abandoned" the same challenge to the 1963 lease in their 2008 partition action. Plaintiffs respond that defendants waived and/or forfeited the defense by failing to raise it below. We agree with plaintiffs.

"The doctrine [of res judicata] has a double aspect, a prior judgment is a bar in a new action on the same cause of action, and in a new action on a different cause of action the former judgment is a collateral estoppel, being conclusive on issues actually litigated in the former action." (*Lewis v. Superior Court* (1978) 77 Cal.App.3d 844, 851.) The first aspect of the doctrine is often referred to as claim preclusion or res judicata while the second aspect of the doctrine is referred to as issue preclusion or collateral estoppel. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, fn. 7.) This case involves the claim preclusion aspect of res judicata.

"A defense founded upon the conclusiveness of a former adjudication must be either pleaded or proved." (*Rideaux v. Torgrimson* (1939) 12 Cal.2d 633, 638 (*Rideaux*); Code Civ. Proc., § 1908.5.) "Such defense is waived if not raised either by the pleadings or the evidence." (*Rideaux*, at p. 638; *Dillard v. McKnight* (1949) 34 Cal.2d 209, 218-219 (*Dillard*).) "New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal. [Citation.]" (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13, fn. 6.)

Defendants did not plead res judicata as an affirmative defense. They implicitly concede that point when they argue that "pleading estoppel [is] sufficient to raise *res judicata*." They cite *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749 (*Thibodeau*) in support, but that case is easily distinguished. In *Thibodeau*, homeowners sued a subcontractor for deficient construction of a driveway. The subcontractor alleged as an affirmative defense that "'Plaintiffs are estoppel [*sic*] from asserting the allegedly

wrongful acts described in their Complaint.'" (*Id.* at p. 754.) The subcontractor then filed a motion "'for judgment on the pleadings/exclusion of evidence/judgment under CCP § 631.8'" in which he argued that the homeowners were estopped from litigating the driveway issue because it had already been litigated in arbitration between them and the general contractor. (*Ibid*.) On appeal from the denial of the subcontractor's motion, this court concluded that the subcontractor meant to plead res judicata rather than collateral estoppel, since his motion for judgment on the pleadings showed that he sought to bar the homeowners' action in its entirety. (*Id.* at p. 758.) Thus, the court concluded that the defendant had "adequately, though inartfully, pleaded a res judicata defense." (*Ibid.*)

No similar conclusion can be made here. In *Thibodeau*, the defendant's motion made his inartful pleading clear. In this case by contrast, defendants' responses and supplemental responses to form interrogatories established that their estoppel defense had nothing to do with any prior adjudication but was instead based on plaintiffs' execution of the Estoppel Agreement and on the fact that they "continued to accept rent checks without complaint to defendants" despite their alleged dissatisfaction with the amount of those checks.

Defendants assert that they raised the res judicata defense by arguing in a posttrial brief that "Plaintiffs[']conduct in bringing the 2008 Partition Action, dropping their claim in that action to cancel the 1963 Lease, and then going forward with the [Partition Action] . . . acts as an estoppel to plaintiffs' claims." We are not persuaded. First, defendants' quotation replaces eight lines of text with ellipses, thus stripping away any context. Second, the case they cited immediately after this language in their posttrial brief has nothing to do with res judicata. *Grafft v. Merrill Lynch, Pierce, Fenner & Beane* (1969) 273 Cal.App.2d 379 was an appeal from the dismissal of an action for failure to bring it to trial within five years. (*Id.* at p. 380.) In an effort to establish excusable delay, the plaintiff argued "that defendants' past actions estopped them from validly opposing the motion for an accelerated trial setting and thereafter moving to

dismiss . . . ." (*Id.* at pp. 383-384.) The court's opinion quoted the rule that "'"[b]efore estoppel can arise . . . there must have been a duty to act and a failure to act in accordance with that duty . . . ."'" (*Ibid.*) This is the portion of the opinion that defendants cited in their posttrial brief. They followed that cite with a parenthetical stating "a duty to act and a failure to act in accordance with that duty." They urged that "[a]s set forth in [their opening posttrial brief], the conduct of plaintiffs in the 2008 Partition Action and partition sale, as well as the [Estoppel Agreement], have resulted [in] changed circumstances as well as the impossibility and/or impracticability of separating out the rights of defendants in the operation of [Magic Sands] as to make cancellation of the 1963 Lease inequitable." The opening post-trial brief that defendants referred to argued in greater detail that plaintiffs should be equitably barred from seeking cancellation of the 1963 lease because "they participated with Lou in submitting the winning bid for the Property on the express terms that the Property 'shall be subject to all leases,' and the 1963 Lease was specifically identified in the purchase contract." In short, their argument below had nothing to do with res judicata. We conclude that defendants waived the defense by failing to plead or even mention it below.[8] (*Rideaux*, *supra*, 12 Cal.2d at p. 638; *Dillard*, *supra*, 34 Cal.2d at pp. 218-219.)

Defendants argue that we can and should consider their res judicata defense because the issue is one of law and the relevant facts are undisputed. We cannot agree that the relevant facts are undisputed. In its answer to plaintiffs' first amended complaint in the 2008 partition action, MHP Roll-Up LLC (the successor in interest to Barbaccia

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[8] Our conclusion that defendants forfeited their statute of limitations and res judicata arguments by failing to raise them below means we need not address Lou's alternative arguments that we should find forfeiture and/or waiver based on GBR's "misleadingly one-sided" recitation of the facts and other claimed misrepresentations. Similarly, our affirmance of the judgment in favor of plaintiffs means we need not address Lou's argument that Cy forfeited all issues on appeal by "so 'skew[ing]' the factual record as to render the issues waived."

Properties Holdings LLC and GBR San Jose MHP Roll-Up LLC and presently the sole equity member of GBR) expressly requested that the property be partitioned by sale "as alternatively requested by plaintiffs in paragraph (16) of the First Amended Complaint, subject to the existing encumbrances of record on the Property, including but not limited to [the 1963 lease]." MHP Roll-Up LLC repeated that request in the prayer to its answer. This raises the factual issue whether GBR consented to having the property partitioned subject to the existing encumbrances and thus effectively removed the question of the validity of the 1963 lease from the trial court's consideration. The issue is critical because the bar of res judicata does not apply where the parties to the prior action expressly agreed to withdraw an issue from the prior court's consideration. (*Miller & Lux, Inc. v. James* (1919) 180 Cal. 38, 44.) Here, the parties dispute whether they consented to withdraw the issue from the prior court's consideration. On this record, we decline defendants' invitation to decide their res judicata argument as a purely legal question. We conclude that they cannot raise that argument for the first time on appeal. (*Rideaux, supra,* 12 Cal.2d at p. 638; *Dillard, supra,* 34 Cal.2d at pp. 218-219.)

C. Estoppel Agreement

Defendants contend that the Estoppel Agreement bars plaintiffs' causes of action for cancellation of the 1963 lease and quiet title.

1. Background

The March 2007 Estoppel Agreement was signed in connection with a $38.5 million loan that defendants' predecessors in interest obtained to finance the buyout in the partnership dissolution proceeding of Lou's partnership interest in Magic Sands. The agreement recited that the lender was "unwilling to make the loan unless Landlord reaffirms to Lender that the provisions of the Lease respecting leasehold mortgages are restated and confirmed." It also stated that the 1963 lease "is in full force and effect in accordance with its terms and has not been further assigned, supplemented, modified or

otherwise amended" except as described in the agreement, that "the Lease shall not be modified, amended, or altered," and that "[t]he term commencement date of the Lease was July 16, 1963, and the term of the lease shall expire on October 1, 2061." A carve-out provision stated that "[n]othing in this [agreement] may be construed to affect the rights of the Louis P. Barbaccia Trust,[9] J. Pecoraro and/or C. Pecoraro in (1) their interests in the Premises, or (2) their rights to proceed with a partition or other judicial action relating to the Premises."

2. Analysis

Defendants contend that plaintiffs' representation in the Estoppel Agreement that the 1963 lease "is in full force and effect in accordance with its terms" and "shall not be modified, amended, or altered" precluded them from later claiming that the lease was void and should be cancelled. We disagree.

Evidence Code section 622 provides that "[t]he facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest . . . ." An estoppel certificate is a "written instrument" within the meaning of Evidence Code section 622. (*Plaza Freeway Ltd. Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 626 (*Plaza Freeway*).) In interpreting such instruments, courts routinely look to the general rules of contract interpretation. (E.g., *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, 622 [interpreting a deed]; *Robert T. Miner, M.D., Inc. v. Tustin Ave. Investors* (2004) 116 Cal.App.4th 264, 271 (*Miner*) [interpreting estoppel certificate and lease together].)

The basic goal of contract interpretation is "to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (§ 1636.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (§ 1638.) "The words

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[9] GBR explains that "[b]y this time, Cy and Lou and their wives held their interests as landlords under the 1963 Lease through living trusts."

of a contract are to be understood in their ordinary and popular sense" unless they are "used by the parties in a technical sense" or "a special meaning is given to them by usage." (§ 1644.) Courts routinely consult dictionaries to ascertain the "ordinary and popular" understanding of words in a contract. (E.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265; *Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1499.) Where, as here, the parties agreed that the Estoppel Agreement was not ambiguous and that the trial court could interpret it without resort to extrinsic evidence, our review is de novo. (*Miner, supra*, 116 Cal.App.4th at p. 271.)

Defendants' contention requires us to determine the meaning of the words "modified, amended, or altered." Specifically, we must determine whether the concepts of cancellation and termination are "included in the more general concepts" of modification, amendment, and alteration, as defendants argued below. The trial court rejected that argument. The court ruled that "these are different concepts, and I'm basing my interpretation in part on . . . [s]ection 1644, words to be understood in the ordinary popular sense and not given any technical meaning." We agree with the trial court.

Webster's New College Dictionary defines "modify" as "to change or alter; esp. to change slightly in character, form, etc." (Webster's New College Dict. (4th ed. 2008) p. 926 (Webster's).) Another dictionary defines "modify" as "[t]o change in form or character; alter . . . . To make less extreme, severe, or strong." (American Heritage Dict. (3rd ed. 1997), p. 877 (American Heritage).) Black's Law Dictionary defines "modify" as "[t]o make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness." (Black's Law Dict. (10th ed. 2014) p. 1157 (Black's).) The definitions of "amend" and "alter" are similar. Webster's defines "amend" as "to make better; improve . . . to change or revise . . . ." (Webster's, at p. 44; see also American Heritage, at p. 42 ["to change for the better; improve: *amended the earlier proposal*"]; Black's, at p. 98 ["[t]o correct or make usu. small changes to something written or spoken; to rectify or make right . . . ."].) Webster's defines "alter"

as "to make different in details but not in substance; modify." (Webster's, at p. 41; see also American Heritage, at p. 39 ["to change or make different; modify"]; Oxford English Dictionary Online (3d ed. 2000; online version Dec. 2015) <http://www.oed.com/view/Entry/5767> (as of Feb. 29, 2016) ["[t]o make (a person or thing) otherwise or different in some respect; to modify . . . ."].)

By contrast, Webster's defines "cancel" as "to make invalid; annul." (Webster's, *supra,* at p. 213; see also American Heritage, *supra*, at p. 204 ["[t]o annul or invalidate"]; Black's, *supra*, at p. 247 ["[t]o terminate a promise, obligation, or right <the parties cancelled the contract>"].) Webster's defines "terminate" as "to bring to an end in space or time; form the end or conclusion of; limit, bound, finish, or conclude." (Websters, at p. 1478; see also American Heritage, at p. 1399 ["[t]o bring to an end or a halt"]; Black's, *supra,* at p. 1700 ["[t]o put an end to; to bring to an end."].) In our view, the usual and ordinary definitions of "modify," "amend," and "alter" cannot reasonably be construed to include the concepts of cancellation or termination. The trial court correctly concluded that cancellation was not a prohibited modification, alteration, or amendment of the 1963 lease.

Defendants fault the trial court for relying on *Fallbrook Sanitary Dist. v. San Diego Local Agency Formation Com.* (1989) 208 Cal.App.3d 753, which in turn relied on the definition of "modification" in the then-current version of Black's. They argue that the ninth edition of Black's defines "modification" as a "change to something; an alteration" and therefore "no longer supports [plaintiffs'] crabbed interpretation of 'modify.'" We disagree. As noted above, the tenth (and most recent) edition of Black's defines "modify" as "[t]o make *somewhat* different; to make *small changes* . . . ." (Black's, *supra,* at p. 1157, italics added.) Cancellation of a lease is not a "small" change, nor does it make the lease only "somewhat different." (*Ibid.*) We reject defendants' argument that the concepts of cancellation and termination are "included in the more general concepts" of modification, amendment, and alteration.

Defendants' reliance on *McClure v. McClure* (1935) 4 Cal.2d 356 is misplaced. *McClure* holds that where a final decree of divorce awards spousal support and the trial court later "makes an order releasing the husband permanently from liability for alimony, and thereby indicates an intent that the order shall be final and not subject to modification, it is not such an order as may be modified under [former] section 139 of the Civil Code by thereafter imposing liability for alimony." (*Id*. at p. 361; see Stats. 1933, ch. 412, § 1.) *McClure* has no application here.

Defendants argue that to allow cancellation of the 1963 Lease while prohibiting "more modest changes such as modification, amendment or alteration" would violate the rule that interpretation of a contract must be fair and reasonable and not produce "an absurd result." They argue that the purpose of the Estoppel Agreement was to confirm the lease's validity in anticipation of a lender making a $38.5 million loan and that canceling the lease will frustrate that purpose by "mak[ing] the loan unsecured rather than secured . . . ." Not so.

The fee and leasehold deed of trust and security agreement reveals that the 1963 lease was not the only security given for the loan. The loan was also secured by Cy's and GBR's fee interests in the property and by (among other things) "[a]ll structures, buildings and improvements," "[a]ll minerals . . . on, under or above the Premises," "[a]ll furniture . . . , equipment . . . , or personal property owned by Grantor and now or hereafter located on, attached to or used in and about the Improvements," "[a]ll leases . . . now or hereafter entered into . . . , [¶] . . . [a]ll contracts and agreements now or hereafter entered into . . . , [¶] . . . [a]ll present and future funds, accounts, . . . accounts receivable . . . ," and "[a]ll other or greater rights and interests of every nature in the Premises and the Improvements and in the possession or use thereof and income therefrom, whether now owned or hereafter acquired by Grantor." In addition, Cy and his business partners gave the bank their personal guarantees. Cancellation of the lease will not make GBR's $38.5 million loan unsecured.

Defendants argue that "the only reasonable interpretation of the 'modify, amend, alter' language is to bar *any* change to the 1963 Lease, including cancellation." We disagree. Defendants' interpretation of the sentence at issue is overly expansive. They repeatedly claim that plaintiffs represented in the 2007 agreement that the lease "would remain in force through 2061," in other words, that plaintiffs would remain inexorably bound for an additional 54 years. This is inconsistent with the plain language of the Estoppel Agreement. The sentence at issue states only that "[t]he term commencement date of the Lease was July 16, 1963, and the term of the lease shall expire on October 1, 2061." In our view, this representation does no more than confirm plaintiffs' understanding as of March 2007 about the beginning and ending dates of the lease. Contrary to defendants' assertion, it does not state that the lease will inexorably bind plaintiffs until 2061.

Defendants' interpretation is also inconsistent with the agreement's carve-out provision, which expressly authorizes plaintiffs and Lou "to proceed with a partition or other judicial action relating to the Premises." Defendants argue that this clause allows only "actions similar to partition actions," that is, "actions that would affect the ownership of the fee interest but not the Lease." They rely on the doctrine of *ejusdem generis*, which provides that where specific words follow general words in a contract, the general words are construed to embrace only things similar in nature to those enumerated by the specific words. (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1275.) That reliance is misplaced, because "[t]he doctrine of *ejusdem generis* is employed as an interpretive aid only when the language in the contract or statute is ambiguous." (*Id.* at p. 1277.) Here, the parties agreed that the Estoppel Agreement was not ambiguous. Thus, we look to the plain language of the carve-out provision, which expressly permitted "partition *or other* judicial action . . . ." (Italics added.) Had the parties wanted to limit the clause to partition *or similar* judicial action, they could and should have said so.

Finally, defendants' interpretation is inconsistent with the purpose of estoppel certificates. An estoppel certificate is "[a] signed statement by a party (such as a tenant or a mortgagee) certifying for another's benefit that certain facts are correct, such as that a lease exists, that there are no defaults, and that rent is paid to a certain date. A party's delivery of this statement estops that party from later claiming a different set of facts." (Black's, *supra*, at p. 669.) "An estoppel certificate reveals *the present intent and understanding* of the parties to a commercial lease agreement." (*Plaza Freeway*, *supra*, 81 Cal.App.4th at p. 626, italics added.) "By providing independent verification of the presence or absence of any side deals, estoppel certificates prevent unwelcome post-transaction surprises that might adversely affect the building's income stream, such as: Has the tenant prepaid any rent? Does the tenant have any known or suspected claims for lease violations? What is the tenant's understanding of provisions in the lease? Are there any modifications or amendments? Did the tenant pay a security deposit? Has the landlord made all the requested improvements? Are there any subleases or assignments? Is the tenant solvent?" (*Miner*, *supra*, 116 Cal.App.4th at p. 273.) The Estoppel Agreement performed this function. It recited facts known to the parties at the time of its 2007 execution. Plaintiffs and Lou do not deny any of the facts recited in the agreement. Their suit is based on facts that they did not discover until Cy's January 2008 deposition. "In weighing the evidence," the trial court expressly found that plaintiffs did not discover any of the facts on which the present suit is based until January 8, 2008. We have already concluded that substantial evidence supported that determination. The trial court properly ruled that plaintiffs' suit was not barred by the Estoppel Agreement.

D. Inadequate Remedy at Law

Defendants contend that the trial court erred in granting equitable relief without proof that damages were an inadequate remedy.

1. Background

At the March 29, 2013 hearing on the parties' revised proposed statements of decision, the trial court observed that "[w]e had a trial, we had proposals, we had a lot of process, and now a day before the sort of final hearing on the statement of decision, I'm hearing inadequacy of legal remedy for the first time." In its statement of decision, the court rejected defendants' "belated" argument for two reasons. The first was based on the historic treatment of land as unique, which gives rise to a presumption that money damages are an inadequate remedy. Defendants thus had the burden of proving that damages would be an adequate remedy, and they failed to do so. As a second and alternative reason for rejecting defendants' argument, the court found that determining the proper amount of money damages "would be especially difficult in this case because the parcel of land here is particularly unique, due to its size, its current and future use, and its location." For that separate reason, the court concluded that cancellation of the 1963 lease was "the most appropriate remedy."

2. Analysis

Defendants argue that the trial court erred in presuming that damages would be an inadequate remedy because the presumption applies only in cases seeking specific performance of an agreement to transfer real property. (§ 3387.) Plaintiffs respond that any error in applying the presumption is "irrelevant" because the second basis for the trial court's ruling was supported by substantial evidence. We agree with plaintiffs.

"[I]n California a suit to have an instrument canceled or adjudged void is akin to a common suit in the old chancery practice and is purely equitable." (*Corrigan v. Stiltz* (1965) 233 Cal.App.2d 381, 387; *Lewis v. Tobias* (1858) 10 Cal. 574, 576.) "[T]he very basis of the granting of equitable relief is the conclusion in view of the circumstances of the particular case that full and adequate compensation cannot be had at law." (*Morrison v. Land* (1915) 169 Cal. 580, 587.) Whether an adequate legal remedy exists is a question of fact for the trial court, "and if the evidence is conflicting, or if opposing

inferences may reasonably be drawn therefrom, it still remains a question of fact for the trial court. There still remains for review upon appeal, however, the question whether there is any substantial evidence to support the finding thereon." (*People v. Monterey Fish Products Co.* (1925) 195 Cal. 548, 564.)

Here, the trial court found that determining the proper amount of money damages "would be especially difficult in this case because the parcel of land here is particularly unique, due to its size, its current and future use, and its location." Substantial evidence supported that finding. The property at issue encompasses 20 acres. It is currently being used as a mobile home park. The 20 acres are part of the larger 56-acre property that constitutes the Magic Sands mobile home park. Only the 20 acres are affected by the 1963 lease, which encumbers the undivided fractional interests that Lou described as "floating" in those acres.

There was evidence that the 1963 lease affected the value of the 20 acres. GBR paid approximately $50 million in 2006 for interests in the mobile home park that were not affected by the 1963 lease. Lou testified that that worked out to about "$1.2 million an acre." He thought the 20 acres should be worth "at least that" in 2010. But the fact that the fractional interests encumbered by the 1963 lease were "floating in the 20 acres" made the property "just about worthless really . . . ." The 20 acres sold for just over $5 million in 2010, after lawyers representing Cy stopped bidding. Hulberg testified that "there are not a lot of 98-year leases around" and that "[e]ven 50-year leases aren't that common." This evidence illustrated the difficulty of finding any comparable properties to determine the fair market value of plaintiffs' interests in the 20 acres, even if we were to assume that the property's current fair market value is the proper measure of damages.

Defendants argue that damages should be "measured by the 'market-level' terms Plaintiffs say the Lease would have contained" but for Cy's undue influence. They contend that this would "more than adequately compensate plaintiffs" for "alleged lost rent (past and future)." At oral argument, GBR emphasized that plaintiffs' complaint

initially sought damages for their aliquot share of the reasonable rental value of the property and that they were only seeking rent back to 2006. These arguments are misleading. The complaint sought cancellation of the lease. It is true that it also sought plaintiffs' "aliquot share of the reasonable rental value [of the property] from December 15, 2006 to the present." But that request was plainly incidental to plaintiffs' cause of action for cancellation. Their first cause of action was labeled "Cancellation of Lease and Damages—Civil Code § 3412." "It is well settled that in [cancellation] actions the court may grant any monetary relief necessary to do complete equity between the parties." (*Stewart v. Crowley* (1931) 213 Cal. 694, 701.) Past damages are recoverable in an action for cancellation of a contract to the extent those damages are not barred by the applicable statute of limitations. (*Love v. Shartzer* (1867) 31 Cal. 487, 497; *Stewart v. Crowley*, at p. 701; *Oswald v. City of El Centro* (1930) 211 Cal. 45, 52.) Plaintiffs sought money damages only back to 2006 because they apparently believed that a four-year statute of limitations applied. The gravamen of their complaint, however, was for cancellation of the 1963 lease.

GBR's counsel acknowledged at oral argument that plaintiffs dropped their damages claim before trial. He speculated that they did so not because damages were difficult to prove but instead because it would serve their purposes to try to get cancellation. But plaintiffs sought cancellation from the outset. As their counsel explained at oral argument, plaintiffs dropped the incidental damages claim because realistically, they had a very real proof problem. How would they figure out what the best use is and how would they provide evidence on what that really is in a realistic way?

GBR argues that it would not be difficult to calculate money damages and that plaintiffs have already demonstrated their ability to do so. We are not persuaded. The fact that plaintiffs' expert was able to make a backward-looking calculation of the reasonable rental value for the three or four years before plaintiffs filed their complaint

does not mean it would be possible to assign a monetary value to the harm plaintiffs would suffer if the lease were to remain in effect until 2061.

Defendants maintain that it is possible to do so. They argue that after trial, plaintiffs "provided calculations from [their expert] as to the alleged lost rent and income [they] will allegedly suffer during the pendency of this appeal." We are not persuaded that those calculations show an ability to assign a monetary value to the harm plaintiffs would suffer if the lease were to remain in effect for the next 45 years. Hulberg's estimate was made in opposition to defendants' request for a nominal $100 undertaking to stay enforcement of the judgment during the pendency of this appeal. (Code Civ. Proc., §§ 917.2, 917.4.) His supporting declaration explained that his 2013 calculations were based on non-current Magic Sands "'rent rolls,'" 2006 operating reports, and other information that GBR provided during discovery. The information allowed him to "approximate" the gross income that GBR would receive and the operating expenses it would incur through July 2015. These were only estimates, however. As plaintiffs' counsel emphasized in the trial court, "[w]e don't really know what the net rental value is or reasonable value is before debt . . . ." Hulberg's approximations did not purport to be a damages calculation. Nor can they be interpreted to suggest that it would be possible to assign a money value to the harm plaintiffs would suffer if the lease were to remain in effect through October 2061.

We see a number of additional problems with defendants' argument that damages can be calculated based on "the 'market-level' terms Plaintiffs say the Lease would have contained" but for Cy's undue influence. The first is that awarding damages on that basis would be tantamount to rewriting the 1963 lease, which courts cannot do. "'Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves . . . . Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts

because they operate harshly or inequitably as to one of the parties.'" (*Cousins Inv. Co. v. Hastings Clothing Co.* (1941) 45 Cal.App.2d 141, 147.)

The second problem is that even if a court could rewrite the 1963 lease, it would be a speculative exercise to decide what terms it would have contained. Hulberg testified, for example, that a 98-year lease term is "[v]ery, very uncommon" and that "[e]ven 50-year leases aren't that common." The Johnson lease had a 90-year term. The brothers' 1967 sublease of their parent's ground lease to Community had a 20-year term. On the evidence presented, there is no non-speculative way to determine what the lease term would have been.

Hulberg also testified that a "market lease" would include a revaluation or readjustment of rent provision. The brothers' 1967 sublease of their parents' ground lease to Community required revaluations every five years. The Johnson lease required a revaluation after 20 years and additional revaluations every five years thereafter. It also included a change in use provision. Hulberg explained that if a similar clause had been included in the 1963 lease, "the same sort of clause would have given a much higher rent" to the parents for the portion of the property that was "essentially cut out and turned into Parcel 8 [for] the Chevron station." A change in use provision is "very protective of the landlord." As Hulberg explained, "If the tenant decides to put a shopping center here or apartment project or something else, this would give a complete revaluation."

This testimony illustrates an even bigger problem with defendants' position. Assuming that a "market lease" would have included revaluation and change in use provisions, there is simply no way to determine that the 20 acres (or indeed the entire Magic Sands complex) would have remained a mobile home park over the multi-year course of the lease. Had the lease required Cy to compensate the parents fairly from the outset, the significant profits he reaped from the unfair lease would have been proportionately reduced. Cy may well have decided at some point that the mobile home park property would be more profitable if it were subdivided and developed into higher-end homes like the homes the brothers built on the parents' Dry Creek Road orchard. Cy might also have decided at some point to develop some or all of the

Magic Sands property into an apartment complex or office park or shopping center. Evidence in the record shows that other San Jose properties that the brothers owned in partnership were developed and redeveloped as times changed and the area grew. Lou testified that mobile home parks, golf courses, and drive-ins were the preferred ways to hold property in the San Jose area in the 1960's. The brothers initially developed the Cottle Road property into a golf course. It was later redeveloped into an apartment complex. There is simply no way a court or indeed anyone could determine how events would have played out (and would continue to play out) under the terms of a hypothetical "market lease." It follows that there is no way to reliably predict what a fair market rent would have been in the past or what it might be at any future point in time.

Hulberg's testimony showed the impracticality of defendants' suggested measure of damages. Thus, substantial evidence supported the trial court's finding that determining the proper amount of money damages would be "especially difficult" in this case. Defendants' contention that the trial court erred in granting equitable relief without proof that damages were an inadequate remedy lacks merit.

E. Full Versus Partial Cancellation of the 1963 Lease

Defendants argue that the trial court erred in cancelling the lease "even as to Lou" because he was not equitably entitled to cancellation "without any accounting for the massive profits he realized." We reject the argument. Restitution is not required in an action to cancel a void instrument pursuant to section 3412. (*Smith v. Williams* (1961) 55 Cal.2d 617, 620-621.) *Fleming v. Kagan* (1961) 189 Cal.App.2d 791 (*Fleming*) does not hold otherwise. Defendants quote a snippet from that case and incorrectly cite *Fleming* to support their assertion that "[i]n fact, restitution is required for both rescission and cancellation." Not so. As the *Fleming* court expressly acknowledged, "the basic distinction between the cancellation of a *void* instrument and the rescission or cancellation of a *voidable* contract must be recognized, and the rule [requiring restoration

of everything of value that the complainant received] should have no application where the instrument is void." (*Fleming*, at pp. 796-797.)

Defendants argue that the trial court erred when it concluded that section 3412 allows partial cancellation of instruments only as to "rights or obligations" and not as to parties. We disagree.

The issue requires us to interpret section 3414. "Our first duty in interpreting a statute is to be guided by the words that appear on the face of the enactment." (*Howard v. Babcock* (1993) 6 Cal.4th 409, 417.) "Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) The statute at issue here provides that "[w]here an instrument is evidence of *different rights or obligations*, it may be canceled in part, and allowed to stand for the residue." (§ 3414, italics added.) It says nothing about canceling an instrument like the 1963 lease, which confers the same rights and imposes the same obligations on plaintiffs as it does on Lou. Thus, the 1963 lease does not come within the express ambit of section 3414.

The cases that GBR cites do not compel a different conclusion. *Reina v. Erassarret* (1949) 90 Cal.App.2d 418 holds that a surviving joint tenant can maintain an action to void a conveyance obtained from his deceased cotenant by fraud or undue influence. (*Id.* at p. 424.) Contrary to GBR's assertion, the case does not "hold[] that a deed of gift could be partially cancelled as to only two of the original five recipients pursuant to § 3414." *Reina* is inapposite here. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372 ["Obviously, cases are not authority for propositions not considered therein."].)

Persson v. Smart Inventions, Inc. (2005) 125 Cal.App.4th 1141 (*Persson*) and *Simmons v. California Institute of Technology* (1949) 34 Cal.2d 264 (*Simmons*) are also inapposite. Both apply an exception to the general rule that a party ordinarily may not

rescind only part of a contract. Those cases stand for the unremarkable proposition that where a contract is divisible, a court may set aside a provision that was procured by fraud. (*Persson*, at pp. 1153-1154; *Simmons*, at p. 275.) Here, where we have determined that the 1963 lease confers the same rights and imposes the same obligations on plaintiffs as it does on Lou, defendants cannot claim that the lease is divisible. GBR's reliance on *Persson* and *Simmons* is misplaced. They provide no other authority for their position, and we have found none. We conclude that the trial court did not err in determining that partial cancellation was unauthorized here.

F. Bona Fide Purchaser

GBR challenges the trial court's finding that it was *not* a bona fide purchaser when it took assignment of the 1963 lease in December 2008. It maintains that the trial court erred in cancelling the lease as to GBR because GBR purchased Magic Sands "without actual or constructive knowledge of [Cy's] alleged undue influence" on his parents. (Capitalization omitted.) We reject the argument.

A bona fide purchaser is one "who gives value before he has any notice, actual or constructive, of prior equities." (*March v. Pantaleo* (1935) 4 Cal.2d 242, 243.) A bona fide purchaser "is not chargeable with the fraud of his predecessors and takes a title purged of any anterior fraud affecting it and free from any equities existing between the original parties." (*Marlenee v. Brown* (1943) 21 Cal.2d 668, 675.) "[W]hether a buyer is a [*bona fide* purchaser] is a question of fact." (*Melendrez v. D&I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1254, italics added.) "Accordingly, we will reverse a trial court's determination on this question only if it is not supported by substantial evidence." (*Ibid.*; *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 643.) Substantial evidence is evidence that is "'reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to support a conclusion.'" (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 303.)

The issue here is whether GBR took assignment of the lease without actual or constructive knowledge of Cy's undue influence and other facts that made the lease cancelable. The trial court found that "at the time GBR took assignment of the 1963 Lease, Cy . . . knew all the facts that constituted the undue influence . . . and knew all the facts that made the 1963 Lease cancelable," that Cy "is a managing member and agent of GBR," and that "Cy's knowledge, acts, and conduct are imputed to GBR." Substantial evidence supported these findings.

Cy testified at his January 2008 deposition that his father wanted him to invest his money for him and that he purchased the Blossom Hill property with his parents' money. He asserted that "[t]hey purchased it because of me. I'm the one that got them to purchase it." He stated that he was "a very sophisticated businessman" even then, that he "regularly" consulted with his parents and offered them advice "on how to invest their money," and that they relied on his advice. He conceded that his parents "weren't aware of lease formulas" in 1963, and he admitted that they were not represented by independent counsel when the lease was negotiated. His father "never had a lawyer. In fact, I don't know if he even knew a lawyer in those days." His father "sat there, I mean came to the [1963] meeting, you know, his heart in his hand." It was Cy who "orchestrated whatever [Cy's] signature is on." This testimony and the documents that Cy signed (including the 1963 lease and the Johnson lease) amply supported the trial court's finding that when GBR took assignment of the lease in December 2008, Cy "knew all the facts that constituted the undue influence . . . and knew all the facts that made the 1963 Lease cancelable."

Substantial evidence also supported the trial court's finding that Cy was a managing member and agent of GBR. GBR does not dispute that it became Cy's successor in interest under the 1963 lease in 2008. Cy testified at trial that he owned GBR. When he was asked on follow-up whether he was "one of the managers of the company," he repeated, "I own it." Cy also identified his signature on GBR's discovery

response verifications. He signed the verifications as the "Managing Member" of Barbaccia Properties Holdings LLC, which the signature block identified as the "Administrative Member" of MHP Roll-Up LLC, which the signature block in turn identified as the "sole member" of GBR. Cy signed the December 2008 Assignment and Assumption of Lease" on GBR's behalf in the same capacity. The trial court could reasonably have concluded from this evidence that Cy was not only an owner but also a managing agent of GBR.

GBR argues that GBR "cannot be treated as one-in-the-same as Cy" because GBR is a separate legal entity that "consists of entities and individuals beyond Cy." The argument misunderstands the court's findings. Contrary to GBR's assertion, the court did not "'pierce the corporate veil.'" GBR is a limited liability company, not a corporation. (See *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963 [explaining that limited liability form, unlike corporate form, "'permits the members to actively participate in the management and control of the company [citation].'"].) Nor did the court "disregard GBR's separate legal status" as a limited liability company. It simply concluded that Cy's knowledge about the 1963 lease transaction could be imputed to GBR because Cy was a managing agent of GBR. California's Revised Uniform Limited Liability Company Act confirms the correctness of the court's conclusion. That statute provides that "[e]very manager is an agent of the limited liability company for the purpose of its business or affairs, and the act of any manager . . . binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom the manager is dealing has actual knowledge of the fact that the manager has no such authority." (Corp. Code, § 17703.01, subd. (b)(2).)

GBR argues that even if Cy was an agent of GBR, knowledge that he acquired "almost half a century after the [1963 lease] was executed" cannot properly be imputed to GBR. We disagree. "'The principal is charged with knowledge which his agent acquires

before the commencement of the relationship when that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal.'" (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 288.) Whether an agent retains knowledge of a transaction that occurred before the creation of the agency relationship and has it present in his mind "'will depend upon the lapse of time and other circumstances.'" (*Christie v. Sherwood* (1896) 113 Cal. 526, 530.)

Here, there was substantial evidence that knowledge of the 1963 lease transaction was present in Cy's mind when GBR took assignment of the lease in December 2008. Cy had testified about that transaction at his January 2008 deposition. The trial court could reasonably have concluded that if Cy could remember facts about the 1963 lease transaction 45 years after it occurred, he was unlikely to have forgotten them less than a year after his deposition. The court properly imputed Cy's knowledge to GBR, and it did not err in concluding that GBR was not a bona fide purchaser.

G. Attorney's Fees and Costs

GBR contends that the award of attorney's fees and costs to plaintiffs must be reversed along with the judgment. It does not challenge the amount of fees and costs awarded. We are not reversing the judgment, so GBR's argument fails.

III. Disposition

Plaintiffs' unopposed request for judicial notice is granted.

The judgment is affirmed. Plaintiffs shall recover their costs on appeal.

Plaintiffs' cross-appeal is dismissed as moot.

GBR's motion to strike portions of appellants' reply brief and application for leave to file a reply in support is denied as moot. The parties shall bear their own costs on the cross-appeal.

_____
Mihara, J.

WE CONCUR:

_____
Elia, Acting P.J.

_____
Bamattre-Manoukian, J.